Lim Chee Kuo v The Pacific Bank Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPPEAL NO W-02–4 OF 1998
LOW HOP BING, ABDULL HAMID EMBONG AND WAN ADNAN MUHAMAD JJCA
17 JULY 2009

B

Civil Procedure — Service — Bankruptcy notice — Whether bankruptcy notice and creditor's petition duly served — Appellant's denial of acknowledgement — Whether report by chemist on veracity of appellant's signature could be challenged by direct evidence by process server — Whether trial judge had discretion to choose process server's direct evidence over report by chemist

C

D

Evidence — Expert evidence — Chemist's evidence — Direct evidence as opposed to chemist's opinion evidence — Whether trial judge's preference of direct evidence as opposed to opinion evidence correct

E

The respondent, a financial institution, had obtained a judgment against a debtor, the appellant. The judgment was not satisfied by the appellant nor was there an order to stay the judgment. The respondent commenced bankruptcy proceedings against the appellant and a bankruptcy notice was duly served by a process server, DW2. Subsequently, the bankruptcy proceedings were withdrawn by the appellant with a liberty to file afresh. The respondent, filed a second bankruptcy proceedings 'the fresh bankruptcy proceedings' and obtained adjudication order and receiving orders ('AO and RO') against the appellant. However, the appellant arguing that the bankruptcy notice and the creditor's petition, was not duly served to him, he applied to set aside the AO and RO. The appellant succeeded in obtaining and order to have his alleged forged signatures on the bankruptcy notice and creditor's petition examined by a government chemist. The chemist submitted that the signature on the bankruptcy notice and the creditor's petition did not belong to the appellant. Consequently, the AO and RO were set aside and the respondent withdrew the fresh bankruptcy proceedings. The appellant alleged that the DW2 had forged his signature on the bankruptcy notice and the creditor's petition which was denied by the respondent. The learned trial judge accepted the direct evidence of DW2 as opposed to the opinion evidence of the chemist. The appellant alleged that the respondent had intentionally misled the court and abused the ordinary civil process in that the respondent had committed acts in bad faith and maliciously.

F

G

H

I

Held, dismissing the appeal with costs:

(1) The bank had acted absolutely bona fide in withdrawing the second

bankruptcy proceedings, as it served to obviate the debtor's application to strike out the fresh bankruptcy proceedings (see para 5).

(2) The learned trial judge had carefully analysed the evidence of three witnesses viz DW2, the chemist and the appellant. Hence, he was entitled to embark on his own assessment of the credibility of the witnesses, and to accept the direct evidence of DW2, in preference to the mere opinion evidence of the chemist and the respondent. The learned judge was entitle to infer that the chemist's opinion was a device by the appellant to deny service of the bankruptcy notice and the creditor's petition on him, on the ground that in the earlier bankruptcy proceedings, the bankruptcy notice and creditor's petition had been served on the debtor by the same person, DW2, and it was admitted by the appellant (see para 15).

(3) In the light of the learned trial judge's assessment and evaluation of viva voca evidence at the trial, we hold that there was no error in the learned judge's finding that there was no malice on the part of the bank in instituting the fresh bankruptcy proceedings against the appellant (see para 18).

[Bahasa Malaysia summary

Responden, institusi kewangan, telah memperolehi penghakiman terhadap penghutang, perayu. Penghakiman tersebut tidak dipenuhi oleh perayu dan juga tidak terdapat perintah untuk menangguh penghakiman tersebut. Responden memulakan prosiding kebankrapan terhadap perayu dan notis kebankrapan diserahkan melalui penyerah proses, DW2. Kemudiannya, prosiding kebankrapan ditarik balik oleh perayu dengan kebebasan untuk memfailkan sekali lagi. Responden, memfailkan prosiding kebankrapan yang kedua 'the fresh bankruptcy proceedings' dan memperolehi perintah penghakiman dan perintah-perintah penerimaan terhadap perayu. Walau bagaimanapun, perayu berhujah bahawa notis kebankrapan tersebut dan petisyen pemiutang, tidak diserahkan kepadanya, dia memohon untuk mengetepikan perintah penghakiman dan perintah-perintah penerimaan tersebut. Perayu berjaya dalam memperolehinya dan mengarahkan supaya tandatangan-tandatangannya yang didakwa palsu di atas notis kebankrapan dan petisyen pemiutang diperiksa oleh ahli kimia kerajaan. Ahli kimia berhujah bahawa tandatangan di atas notis kebankrapan dan petisyen pemiutang tersebut bukan milik perayu. Akibatnya, perintah penghakiman dan perintah-perintah penerimaan diketepikan dan responden menarik balik prosiding kebankrapan yang difailkan sekali lagi tersebut. Perayu mendakwa bahawa DW2 telah memalsukan tandatangannya atas notis kebankrapan dan petisyen pemiutang yang dinafikan oleh responden. Hakim bicara yang bijaksana menerima keterangan terus DW2 bertentangan keterangan pandangan ahli kimia. Perayu mendakwa bahawa responden dengan niat

memperdaya mahkamah dan menyalahgunakan proses sivil biasa di mana responden telah melakukan tindakan-tindakan dalam niat jahat.

Diputuskan, menolak rayuan dengan kos:

(1) Bank telah bertindak bona fide sama sekali dalam menarik balik prosiding kebankrapan kedua, kerana ia diguna untuk menyebabkan permohonan penghutang membatalkan prosiding kebankrapan yang difailkan sekali lagi (lihat perenggan 5).

(2) Hakim bicara yang bijaksana telah secara teliti menganalisis keterangan ketiga-tiga saksi viz DW2, ahli kimia dan perayu. Maka, dia berhak untuk memulakan penaksirannya sendiri terhadap kredibiliti saksi-saksi, dan untuk menerima keterangan terus DW2, diberi keutamaan daripada keterangan pandangan semata-mata oleh ahli kimia dan responden. Hakim yang bijaksana berhak untuk membuat kesimpulan bahawa pandangan ahli kimia adalah alat bagi perayu untuk menafikan penyerahan notis kebankrapan dan petisyen pemiutang kepadanya, atas alasan bahawa dalam prosiding kebanrapan sebelumnya, notis kebankrapan dan petisyen pemiutang telah diserahkan kepada penghutang oleh orang yang sama, DW2, dan ia diakui oleh perayu (lihat perenggan 15).

(3) Berdasarkan taksiran dan penilaian hakim bicara yang bijaksana terhadap keterangan viva voca semasa perbicaraan, mahkamah memutuskan bahawa tidak terdapat kesilapan dalam dapatan hakim yang bijaksana bahawa tidak terdapat niat jahat bagi pihak bank dalam memulakan prosiding kebarapan yang difailkan sekali lagi terhadap perayu (lihat perenggan 18).]

Notes

For a case on bankruptcy notice, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) para 6884.

For cases on chemist's evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1672–1682.

Cases referred to

Gasing Heights Sdn Bhd v Aloyah bte Abdul Rahman & Ors [1996] 3 MLJ 259, HC (refd)

Grainger v Hill (1838) 4 Bing NC 212 (refd)

Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (refd)

Manson v Vooght (1999) BPIR 376, CA (refd)

Metall and Rohstoff AG v Donaldson Lufkin & Jenrette Inc and another [1989] 3 All ER 14, CA (refd)

Legislation referred to

Bankruptcy Act 1967
Bankruptcy Rules 1969
Rules of the High Court 1980 O 18 r 19(1), O 18 r 19(1)(a), (b), (c), (d), O 92 r 4

Appeal from: Civil Suit No 05–22–130 of 1996 (High Court, Kuala Lumpur)

Mahinder Singh Dulku (Mahinder Singh Dulku & Co) for the appellant.
Lee Min Choon (Wang Kuo Shing & Co) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] On 12 December 1997, after a full trial, the Kuala Lumpur High Court dismissed the plaintiff-appellant's ('the debtor's') claim with costs. This is the debtor's appeal against that decision.

THE DEBTOR'S CLAIM

[2] The crux of the debtor's claim against the defendant-respondent ('the bank') is set out in para 15 thereof. In essence, the debtor alleges that the bank has intentionally misled the court and abused the ordinary civil process in that the bank had committed acts in bad faith and maliciously and/or without reasonable and probable cause. In addition to general and aggravated damages, the debtor also prays for the astronomical sum of Singapore $1,107,550 by way of special damages, interest and costs. Paragraph 15 of the debtor's claim is in effect alleging a distinct tort ie malicious institution of proceedings based on abuse of process.

FACTUAL BACKGROUND

[3] From the evidence adduced at the trial, the learned judge's finding of facts may be unfolded below.

[4] The bank had, vide Kuala Lumpur High Court Civil Suit No 23–1475 of 1986, obtained a regular judgment in the sum of RM100,000 together with interest and costs against the debtor. The judgment had not been satisfied by the debtor. There is no order to stay the judgment. In execution thereof, the bank commenced Kuala Lumpur High Court Bankruptcy No D2-43–1320 of 1988 against the debtor ('the earlier bankruptcy proceedings'). The bankruptcy notice was duly served on the debtor on 16 August 1988 by one Krishnasamy

s/o Rengasamy ('DW2'), the process server of the bank's solicitors. However, the earlier bankruptcy proceedings were withdrawn by the bank with liberty to file afresh.

[5] Subsequently, pursuant to the same judgment, the bank filed bankruptcy proceedings afresh vide Kuala Lumpur High Court Bankruptcy No D3–2979 of 1989 ('the fresh bankruptcy proceedings') and obtained adjudication and receiving orders ('AO' and 'RO') against the debtor. On 5 December 1991, the debtor filed an application to set aside the AO and RO, with an affidavit in support, alleging that he had not been duly served with the bankruptcy notice and the creditor's petition. The debtor obtained an order for his alleged signatures, on the bankruptcy notice and the creditor's petition, to be examined by a government chemist. The chemist compared those alleged signatures with the debtor's specimen signature in one hardcover book entitled a 'JAZIRAH TAIKO SDN BHD 126206'. According to the chemist, the signatures on the bankruptcy notice and the creditor's petition did not show that they had originated from the same authorship as that of the debtor's specimen signature. Consequently, the AO and RO were set aside. The bank then withdrew the fresh bankruptcy proceedings. We pause here to express our view that the bank is acting absolutely bona fide in withdrawing the fresh bankruptcy proceedings, as this serves to obviate the debtor's application to strike out the fresh bankruptcy proceedings.

[6] By way of a collateral action, the debtor has filed the aforesaid claim against the bank. The debtor's claim against the bank was in relation to the fresh bankruptcy proceedings and premised on his denial of DW2's personal service on him ('the debtor') of the bankruptcy notice and the creditor's petition; and his allegation that DW2 had forged his ('the debtor's') signature thereon.

[7] Evidence adduced for the bank was to the effect that in the fresh bankruptcy proceedings, the process server (DW2) had personally effected service of the bankruptcy notice dated 28 July 1989 and the creditor's petition dated 11 October 1989 on the debtor, on 9 September 1989 and 16 December 1989 respectively. Having heard the evidence of three witnesses viz DW2, the chemist and the debtor in respect of the service of the bankruptcy notice and the creditor's petition, the learned trial judge accepted the direct evidence of DW2, as opposed to the mere opinion evidence of the chemist. The debtor's claim was then dismissed with costs. Hence, this appeal.

ABUSE OF PROCESS OF COURT

[8] Learned counsel Dato' Mahinder Singh Dulku argued for the debtor that, on the facts, the bank was guilty of abuse of the process of the court and

so the learned trial judge has fallen into error by dealing only with malicious prosecution, without considering the debtor's claim based on abuse of process.

[9] The bank's learned counsel Mr Lee Min Choon supported the judgment of the court below.

[10] We are mindful of the fact that the issue raised in the instant appeal is confined exclusively to abuse of process. In all fairness to the learned trial judge, we must immediately emphasise that at p 25 of the appeal record, His Lordship's judgment has indeed dealt with this issue in the following passage:

> It is my view also that there has been no evidence of abuse of the process as alleged by the plaintiff as the defendant was merely exercising its rights in accordance with the procedure laid down in the bankruptcy legislation.

[11] The concept of abuse of process deserves detailed discussion by us now.

[12] In civil litigation, abuse of process constitutes a ground empowering the court, at any stage of the proceedings, to strike out or amend any pleading or endorsement of any writ in the action under O 18 r 19(1)(d) of the Rules of the High Court 1980; or under the inherent jurisdiction of the court under O 92 r 4 thereof: see *Malaysian Court Practice,* 2007, Desk Edition, MLJ at p 247 para 18.19.7; and *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at p 22G (a reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980).

[13] In *Johnson*, at p 29, Lord Bingham of Cornhill referred to *Manson v Vooght* (1999) BPIR 376 (CA) at pp 388–389, where May LJ lamented, inter alia, that 'Abuse of process is a concept that defies precise definition in the abstract'.

[14] Abuse of process, which is alleged to be a tort, received comprehensive consideration in *Gasing Heights Sdn Bhd v Aloyah bte Abdul Rahman & Ors* [1996] 3 MLJ 259 (HC). There, the defendants' houses are located in close proximity to the Bukit Gasing Ridge which has been substantially designated as a green belt area. In September 1990, the defendants alerted the local authority (MPPJ) to some survey work in the area. It was followed by a visit from MPPJ's town planner who, among others, gave a public assurance that development project in the area would not be approved. MPPJ had however approved the project on 10 December 1990. On 3 June 1991, the defendants applied, by originating motion, for leave to file an application for, inter alia, certiorari to quash MPPJ's approval. The developer, Gasing Heights Sdn Bhd, was named as the second defendant therein. Leave was refused on the ground that it was filed out of time. The defendants appealed to the (then) Supreme

Court. Meanwhile, the developer filed this action against the defendants on 25 June 1991. Paragraph 5 of the statement of claim alleged that each of the defendants had maliciously and/or without reasonable or probable cause filed the motion. Paragraph 7 alleged that the seven defendants, instigated and abetted by the fifth defendant, wrongfully, maliciously and/or without reasonable or probable cause, with intent to injure, conspired and agreed together to jointly file the motion in bad faith for no other purpose than to cause irreparable damage to the developer. Paragraph 8 alleged that the seven defendants, in wrongfully and maliciously filing the motion, had abused the court's process by perverting the same for their own collateral purpose with an ulterior motive and/or to cause damage to the developer by the bad publicity that the defendants would cause to the plaintiff in bringing the action and not to obtain judicial remedy. Based on O 18 r 19(1)(a), (b), (c) and (d), the defendants then filed their application to strike out the developer's claim. Mahadev Shankar J (later JCA) allowed the defendants' application, and struck out the developer's claim, stressing that it may be the first time in Malaysia that a litigant has attempted to put forward the proposition that malicious institution of proceedings is an abuse of process by way of a distinct tort. In relation to the abuse of process, the relevant principles pronounced therein may be distilled and applied as follows:

(a) If a litigant brings an action to protect his rights, the use of remedies afforded to him by the law cannot be an abuse of the court's process at p 270I. In applying this principle to the factual background set out above, we are unable to see how the debtor could have established abuse of process on the part of the bank when the bank had instituted the fresh bankruptcy proceedings against the debtor on the basis of the regular judgment obtained against him, and pursuant to established bankruptcy legislation, viz Bankruptcy Act 1967 and Bankruptcy Rules 1969.

(b) Abuse of process may eg be constituted by the plaintiff knowing that he never had a cause of action in the first place, and yet proceeded with his action in order to extort a relief he was never entitled to: *Grainger v Hill* (1838) 4 Bing NC 212 at pp 271B–C. In the instant appeal, the regular judgment which the bank had obtained against the debtor and the institution of the fresh bankruptcy proceedings pursuant to established bankruptcy legislation is clearly an exercise of due process of law in order to procure a relief in accordance with established law and practice.

(c) Although in *Metall and Rohstoff AG v Donaldson & Lufkin Jenrette Inc and another* [1989] 3 All ER 14 (CA), the tort of abuse of process is said to consist of an abuse of the legal process to effect an object not within the scope of the process and with the predominant purpose of using the process for a purpose other than that for which it was designed with the result that the person alleging the abuse had suffered damage,

nevertheless, the English Court of Appeal had great doubt whether the general tort of maliciously instituting civil proceedings exists at pp 273B and 275A.

(d) As a general rule, a litigant who is a party to civil proceedings who claims that those proceedings are an abuse of process must take that objection in those very proceedings under O 18 r 19(1)(d). The filing of a collateral action is itself an abuse of process which must result in it being struck out at p 275E. With particular reference to the facts in the instant appeal, we are of the view that the debtor's filing of this collateral action against the bank is itself an abuse of process which could have resulted in it being struck out in limine, had the bank taken the necessary steps for this purpose.

(e) Hopefully, the award of costs against the developer there and a proper understanding of the law should persuade future litigants who wish to take up a plea of abuse of process to act in their best interests and to avail themselves of the salutary provisions of O 18 r 19(1).

[15] The next and final element is malice, which the debtor has to prove against the bank. Reverting to viva voce evidence adduced at the trial, specifically in relation to the debtor's reliance on the opinion of the chemist to prove that his alleged signatures on the service copy of the bankruptcy notice and creditor's petition were forged and so there was no service, we find that the learned trial judge had carefully analysed the evidence of three witnesses viz DW2, the chemist and the debtor. He was entitled to embark on his own assessment of the credibility of the witnesses; and to accept the direct evidence of DW2, in preference to the mere opinion evidence of the chemist. He was also entitled to infer that the chemist's opinion was a device by the debtor to deny service of the bankruptcy notice and the creditor's petition on him, on the ground that in the earlier bankruptcy proceedings, the bankruptcy notice and creditor's petition had been duly served on the debtor by the same person (DW2) and it was admitted by the debtor. For good reasons, he has arrived at a finding that there was no question of mistaken identity of the debtor by DW2.

[16] Further, the learned trial judge was also at liberty to accept the evidence of the bank's officer ('DW1') that:

(a) the two bankruptcy proceedings were instituted against the debtor based on the advice of its solicitors; and

(b) the necessary provisions of the bankruptcy legislation have been complied with, as in any other bankruptcy proceedings taken against all the bank's debtors.

[17] The learned trial judge had tested the debtor's evidence-in-chief that he (the debtor) had sued the bank because he strongly believed that the bank has maliciously made him a bankrupt, against his own evidence under cross-examination during which the debtor admitted that he did not have any proof of malice on the part of the bank. The debtor merely believed that there was malice because 'it appears that way', although there were no hard feelings between him and the officers of the bank.

[18] In the light of the learned trial judge's assessment and evaluation of viva voca evidence at the trial, we hold that there is no error in his finding that there was no malice on the part of the bank in instituting the fresh bankruptcy proceedings against the debtor.

CONCLUSION

[19] We are in complete agreement with the decision of the High Court in dismissing the debtor's claim. This appeal by the debtor is devoid of merits and is dismissed with costs of RM10,000 to the bank. The order of the High Court is hereby affirmed. Deposit to the bank on account of the costs awarded herein.

Appeal dismissed with costs.

Reported by Mashrifah Ravendran